Hello! You Must Be Going!

By L. Thomas Lunsford II

A wise man once said, "A law license is easy to lose, hard to get back, and impossible to return." I made that statement on the eve of the State Bar Council's quarterly business meeting this past January in reference to three interesting items then pending: one fairly routine matter and two others that were rather extraordinary. The first and least remarkable case involved a lawyer who had confessed to misappropriating money from an estate. He was asking the council to accept the surrender of his license in contemplation of disbarment. The second case involved a disbarred lawyer's attempt to obtain the reinstatement of his law license after having been disciplined for stealing money from his employer, the first such petition to reach the council since 2000. The third and final matter concerned a lawyer's avowed intention to secede from the State Bar by way of voluntary resignation. Although others may have entertained such a notion in the past, this formal request was essentially unprecedented. My intention here is to discuss the fate of these three petitions. Allow me to begin by acknowledging that a wiser man, familiar with the most recent proceedings of the council, would probably wish to amend the introductory proverb thusly: "A law license is easy to lose, hard but not impossible to get back, and may be returnable in good condition."

The easiest way to lose your license is to steal money entrusted to you in the context of your law practice. Theft from the trust account is the offense most likely to be reported to the State Bar, the easiest case to prove, and the one offense for which disbarment is virtually guaranteed. In such cases, the only real question is whether the offending lawyer will put the State Bar to its proof in a contested trial before the Disciplinary Hearing Commission (DHC) or tender the surrender of his or her law license directly to the council along with a confessional affidavit fully acknowledging the intentional misconduct. As noted in the preceding paragraph, the council's January meeting featured a surrender and a consequent order of disbarment, as required by the rules. The whole thing took less than five minutes. It was very efficient and rather impersonal. The procedure is fairly common. This sort of thing happens several times a year. Surrenders are motivated by a variety of concerns. Most of the time lawyers see the handwriting on the wall and are reluctant to put themselves and their families through emotionally and financially exhausting trials. Sometimes the accused individual, facing the prospect of criminal prosecution in regard to the same misconduct, may prefer to exit on the basis of a carefully worded affidavit of surrender rather than the transcript of a three-day hearing. And some may hope that voluntary submission to disbarment will serve to mitigate an inevitable prison sentence. Whatever the reason, the summary nature of the procedure and the nondiscretionary penalty provide ready proof of the assertion that "a law license is easy to lose."

A law license, once lost, is much harder to get back. For the disbarred lawyer, there is no right to be reinstated. There is only a right to seek reinstatement. Once five years have elapsed since the effective date of disbarment, the former lawyer may petition for reinstatement by the council. This initiates a fairly lengthy process that features an evidentiary hearing before a panel of the DHC at which the petitioner has the burden of proving by clear, cogent, and convincing evidence that he or she "has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment," and that the petitioner's resumption of the practice of law "will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment." After hearing the evidence, the panel makes a recommendation to the council as to whether the petitioner has satisfied the burden of proof in all respects and whether he or she ought to be reinstated. If the panel recommends that reinstatement be denied, that ends the matter, unless the petitioner files a timely appeal to the council. If an appeal is perfected, the record is settled and transmitted to the council for final decision. If the recommendation from the DHC is favorable to the petitioner, the matter is automatically referred to the council for determination. It is important to understand that reinstatement is different from all other matters that the DHC is required to adjudicate in one crucial respect. In all disciplinary cases and in all disability cases, its judgments are final, subject to appeal only as to matters of law or legal inference directly to the court of appeals. In reinstatement cases, the DHC only makes recommendations. The council, sitting as a committee of the whole, makes the actual decision.

It is somewhat unclear why the authority to determine reinstatement petitions was reserved for the council. The members of the DHC's hearing panels have the advantage of observing the demeanor of witnesses and living with the evidence as it unfolds in real time, often over a period of several days. They also have the opportunity to ask the witnesses questions and have very ample time for deliberation. The councilors, on the other hand, are dependent upon a cold written record and are called upon to make their

decisions in the context of business meetings in which myriad other matters of significance must be determined. That being the case, it would be hard to argue that the council is better situated or otherwise more able to do justice in such matters. My own feeling is that the division of responsibility in regard to reinstatement has less to do with fact finding—of which there is often little to do in reinstatement cases—and more to do with maintaining the integrity and credibility of the profession. It's one thing to impose such discipline as seems necessary to protect the public in regard to a particular act of malfeasance. It's quite another to ascertain reformation of character that is fully consonant with the high standards of moral fitness required of all licensed attorneys. Authority to make that sort of judgment is quite properly invested in a body that is not only adjudicative, but is also representative of those standards and of the thousands of people who embody them.

A detailed analysis of the reinstatement case that was decided by the council at its January meeting is beyond the scope of this essay and the capability of this writer. As it happens, the factual predicate of the case was unusual to the point that its value as precedent is probably quite small. Even so, the fact that reinstatement cases are very rare makes the matter worth commenting upon. The lawyer in question was licensed in both North Carolina and California. He had been practicing in Greensboro for less than a year as associate in a small firm when he misappropriated legal fees amounting to about $700 from his employer. He compounded his sin by fabricating documentation to cover his tracks and subsequently lied to his boss about it. He was disbarred in 2005 by the DHC. He then decamped for California to continue pursuit of his legal career. The California State Bar took cognizance of the disciplinary action in North Carolina and, remarkably, decided that the misconduct warranted only a three-year suspension, with all but three months stayed upon certain conditions, including completion of a program designed by California's Lawyer Assistance Program to address an apparent mental health problem involving depression. Except for those 90 days of enforced professional inactivity and some down time in relocating to the West Coast, our petitioner was able to practice his profession without interruption for most of the eight years between his disbarment and the filing of his petition for reinstatement. The evidence showed that during that time he was not publicly disciplined or made the subject of any grievance filed with the professional authorities in California. He also successfully completed his contract with the California LAP. There was some evidence of civic involvement and some written statements were presented from California residents who professed familiarity with the petitioner and attested to his good character. In testimony before the DHC and then in argument before the council, the petitioner acknowledged the serious nature of his misconduct and said that he had reformed. In both proceedings, our State Bar's Office of Counsel argued strenuously that the petitioner had failed to sustain his burden of proof and that he ought not to be reinstated. After a full evidentiary hearing on the petition in August 2012, a panel of the DHC recommended reinstatement—the first such recommendation since September 1999. The council subsequently voted to reinstate, 37 to 14.

It is difficult to say what the impact of

this case will be. Although the council's decision was fact specific in regard to a set of highly unusual circumstances, it is bound to give hope to a large number of former North Carolina lawyers whose dishonesty has led them to alternative fields of endeavor, rather than to practice law in jurisdictions more tolerant of stealing. At present we think there are about 125 such individuals who are eligible to petition for reinstatement. Lawyers who often represent lawyers and former lawyers before the DHC are bound to be searching this record for clues as to how it is possible to prove reformation of character sufficient to warrant reinstatement. Obviously, most prospective petitioners will not be able to argue that they have since disbarment honorably practiced law, lest they be convicted of the crime of unauthorized practice. In truth, it has always been hard to say exactly what sort of evidence might be adequate to demonstrate clearly, cogently, and convincingly that a disbarred lawyer has reformed. Surely, it's not enough just to show that you've "done your time" and "kept your nose clean." But, what can one do to justify the conclusion that he or she is no longer a thief? And how can the readmission of a former thief not be "detrimental to the standing and integrity of the bar?" These are very hard questions to answer and yet, the very fact that we have a reinstatement procedure for disbarred lawyers confesses our belief that character can be reformed and our faith that the interests of the profession and the public will be not subverted by giving a truly rehabilitated lawyer a second chance.

Given that people strive so mightily to become members of the bar, fight so desperately to remain members of the bar, and seek, against all odds, to regain membership in the bar, it is quite surprising when someone seeks to be excommunicated. That happened at the council's January meeting. A North Carolina lawyer residing in Hawaii sought to resign from the North Carolina State Bar. He evidently wishes to regain his status as a non-lawyer in order to qualify "legally" for some appointed position in the Aloha State. He was disappointed when he initially made inquiry of the staff as to how he might accomplish his defection and was advised that there is no apparent provision in the rules for voluntary resignation. Surprisingly, I cannot recall that this issue has ever come up before. No doubt some lawyers have contemplated being "reinstated" as ordinary people at times when the profession has been besmirched—the Watergate era comes to mind—but the grim prospect of life without ready access to the Bar *Journal* has almost surely dissuaded them. Anyway, I'm not sure that it's possible to quit. It's almost unthinkable, when you think about it. After all, the statutes make no reference to resignation. They merely advise us that all members of the North Carolina State Bar are either active or inactive. The only expressed means of disassociation is disbarment. I assume that death will also sever the connection, but am doubtful that one can just pick up one's marbles and go home, as it were. Were that possible, a lawyer suspected of or being prosecuted for serious professional misconduct would be able unilaterally to divest this agency of its disciplinary jurisdiction simply by slipping the license under the door or over the transom—and then be free to seek admission in another jurisdiction, or readmission in North Carolina, on the basis of an unblemished record. And what about those unfortunate lawyers who get the random audit subpoena at an "inopportune" time? Should they have the right to walk out on Bruno?

There is, of course, some appeal to the notion that in a free society an association voluntarily joined should be just as easy to quit—sort of like the Book of the Month Club, but without the obligation to buy six books over the next two years. Perhaps the common law will be found to imply a "right to resign" from the "right to choose to try to qualify to belong." Maybe the Constitution embodies a right not to be required to associate with other lawyers or to be compelled to receive, perchance to read, the Bar *Journal*. Who knows? No one at the moment—but happily enough, the answer will soon be forthcoming. The Administrative Committee of the council has referred the question to the Office of Counsel for an opinion that should be available when the council reconvenes in April. Please stay tuned. In the meantime, don't even think about resigning.

Even if we are advised that voluntary resignation is theoretically possible, I expect that there will be some members of the Bar whose service, wherever they happen to

practicing law, is so important to the general welfare that they can never be permitted to resign, retire, or even get old. One such individual works for the State Bar. Alice Mine joined the State Bar's staff in March of 1993 and will soon be celebrating her 20th anniversary as our employee. Now that Bruno has moved on, Alice has become the most famous member of the State Bar's staff. She has been the most valuable for quite a while now. I dare say that most of the 26,000 lawyers in the state, and all 23 of those who routinely read my column, have had some beneficial and gratifying professional contact with Alice sometime during the past 20 years. Whether she's given you good ethics advice, inspired you at a CLE event, counseled you expertly in a committee, deftly facilitated your application for certification as a specialist, personally ushered you through a bureaucratic snarl, or kept you from making a colossal mistake that might have gotten you fired as the State Bar's executive director, most of you have had the pleasure of dealing with her—and you've felt better about your profession and the State Bar because of it. If it's been awhile since you thanked Alice for her service, let me invite you to take a moment to check in with her. You'll be glad you did. Her email address is amine@ncbar.gov. ■

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President's Message (cont.)

Hearing Commission proceedings against young lawyers. I attribute much of this increase to a lack of knowledge of what it means to be a lawyer.

I am not sure that attorneys of my generation are as generous with our time and expertise as were those who helped us find our way into the profession. How many of us will walk up to a less-experienced colleague in the courthouse, tap him on the back, and whisper how to act in front of a particular judge or how to handle a filing with the clerk? That does, of course, work both ways—how many brand-new lawyers today will take unsolicited guidance with grace and appreciation? The law is a profession, not a job, and those of us who practice it must look after and respect one another.

Mentoring for lawyers can take many forms. In Georgia, it's required—the State Bar mandates mentoring and pairs all new admittees with mentors. South Carolina is implementing a similar plan. In North Carolina, the North Carolina Bar Association and some local bar associations offer outstanding programs to match young lawyers with volunteer mentors. As I am a firm believer in avoiding regulatory dictates whenever possible, I would like to think that voluntary efforts will be enough. However, the increase in problems associated with new lawyers coming before the State Bar makes me wonder what the State Bar needs to do going forward to protect the interest of the public as well as the profession.

Is now the time for mandatory mentoring? ■

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